A **DR SIM KUI HIAN v. CHONG CHIENG JEN & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
LAU BEE LAN JCA
RAVINTHRAN PARAMAGURU JCA
MOHD SOFIAN ABD RAZAK JCA
B [CIVIL APPEAL NOS: Q-02(IM)(NCVC)-120-01-2021, Q-02(IM)(NCVC)-121-01-2021, Q-02(IM)(NCVC)-247-02-2021 & Q-02(IM)(NCVC)-248-02-2021]
31 MARCH 2021

C ***CIVIL PROCEDURE:*** *Contempt – Contempt in face of court – Advocate delayed in filing documents – Judge dissatisfied with explanation and made finding of prima facie contempt in face of court against advocate – Findings made without warning that advocate was cited for contempt – Whether advocate given opportunity to be heard – Whether procedure adopted by judge correct – Whether there was procedural*
D *fairness – Whether there was contempt in face of court – Rules of Court 2012, O. 52*

CIVIL PROCEDURE: *Case management – Summary dismissal – Advocate delayed in filing documents – Judge dissatisfied with explanation and summarily dismissed claim for non-compliance of case management directions – Whether judge wrongly*
E *exercised discretionary power to dismiss claim summarily – Whether nature of non-compliance sufficiently serious to defeat purpose of case management direction – Whether trial disrupted – Rules of Court 2012, O. 34*

The appellant ('plaintiff') and the respondent ('defendant') had sued each
F other for defamation, at the High Court, by way of main claim and counterclaim, respectively. At a case management hearing, the Judicial Commissioner ('JC') realised that the advocate ('Mr Shankar') representing the plaintiff was late in filing the bundle of documents and pleadings ('documents'). The JC was not satisfied with the explanation by Mr Shankar. The defendant objected to the late filing of the documents and sought 'strict
G directions for future conduct of the case so that there is no delay', but did not ask for any sanctions against the plaintiff or Mr Shankar. However, the JC proceeded to summarily dismiss the plaintiff's claim, pursuant to O. 34 r. 2(3) of the Rules of Court 2012 ('ROC'), for non-compliance of the case management directions. Despite no indication that he intended to commence
H contempt proceedings, the JC made a finding of '*prima facie*, contempt in the face of court' against Mr Shankar and found that the latter had 'compromised the integrity of the trial and obstructed the administration of justice'. The pronouncement was followed by a proposal to fix a date for Mr Shankar to prepare his defence. The JC then ordered that Mr Shankar be referred to the
I Advocates Disciplinary Tribunal ('order'). Hence, the present appeals. The plaintiff and Mr Shankar filed two appeals each. The issues that arose were: (i) whether there was procedural fairness; (ii) whether there was contempt in the face of the court; and (iii) whether the order was appealable.

Held (allowing appeals; reinstating appellant's claim and ordering case be heard before another judge)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The JC identified the type of contempt that warranted action by him as 'contempt in the face of the court'. Order 52 of the ROC provides the procedure for contempt proceedings. The finding of '*prima facie,* contempt in the face of the court', as recorded by the JC, had no basis in the scheme of O. 52. Although no formal notice of charge is required, the alleged contemnor must understand the offence and be given the opportunity to defend himself before a finding is made. A finding of contempt, *prima facie* or otherwise, must only be made after opportunity to be heard is given. By making findings without warning that he was citing him for contempt, the JC missed an important procedural step in O. 52 r. 2A(1) that embodies a natural justice principle, *ie*, no man shall be condemned unheard. The procedure adopted by the JC was flawed and prejudiced the right of Mr Shankar to defend himself under O. 52 r. 2A. The finding of contempt against Mr Shankar was set aside. (paras 13, 14, 19, 21 & 22)

(2) Contempt in the face of court is invoked for cases whenever there is gross interference with the course of justice and whenever it is urgent and imperative for the court to act at once. The JC may have had good reasons to disbelieve the explanation for the delay; it was within his purview to come to that conclusion. However, there was no material before the JC for the finding that Mr Shankar had 'compromised the integrity of the trial and obstructed the administration of justice'. If there was a material to suggest as such, it was for the defendant to take a position on this matter and file a motion under O. 52 r. 3 of the ROC, which the defendant did not. Therefore, the JC erred in making a finding of contempt in the face of the court, *prima facie* or otherwise, against Mr Shankar. (para 23)

(3) Since the order was made without hearing Mr Shankar's and had prejudiced his rights, the order was appealable. The order of the High Court was set aside. (paras 24 & 39)

(4) The JC wrongly exercised his discretionary power to dismiss the plaintiff's claim summarily. The defendant did not even apply for the dismissal or striking out of the plaintiff's claim. Unless the nature of the non-compliance was sufficiently serious to defeat the purpose of the case management direction, the drastic action of dismissing the action without warning should not be resorted to. The trial was not disrupted despite the delay in the filing of the documents. The dismissal of the suit merely because the explanation for the delay was unbelievable could not be reconciled with the main purpose of the case management regime in O. 34 of the ROC. (paras 31, 34 & 36)

Case(s) referred to:

Mukhriz Mahathir v. Datuk Seri Mohd Najib Tun Hj Abdul Razak & Anor [2018] 6 CLJ 573 CA ***(refd)***

Uthayakumar Ponnusamy v. Abdul Wahab Abdul Kassim (Pengarah Penjara Kajang) & Ors [2020] 1 CLJ 82 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 13

Federal Constitution, art. 126

Rules of Court 2012, O. 34 r. 2(2), (3), (4), O. 52 rr. 2A(1), (2), (3), (4), 3, 6(4), 9, O. 59 r. 8(b)

For the appellant - Bong Ah Loi, Shankar Ram Pohumall, Wong King Wei, Russell Lim Jian Liang & Yu Ying Ying; M/s Thomas, Shankar Ram & Co Advocs

For the respondent - Michael Kong Feng Nian & Chong Siew Chiang; M/s Chong Brothers Advocs

Watching brief:

For the Bar Council - Clement Wong

For the Advocates Association of Sarawak - Ma Seong Yuin

[Editor's note: For the High Court judgment, please see Dr Sim Kui Hian v. Chong Chieng Jen [2021] 1 LNS 596 (overruled).]

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] All the four appeals before us are related. They emanate from the pronouncement of "*prima facie*, contempt in the face of the court" against an advocate in the course of a case management hearing. At the same time, the suit of the plaintiff was dismissed by the learned Judicial Commissioner. What remained was the counterclaim of the defendant. In this judgment, we shall continue to refer to the parties by their original titles; the appellant shall be referred to as plaintiff and the respondent shall be referred to as defendant. The advocate in question who represented the plaintiff shall be referred to by his name, Shankar Ram Pohumall ("Shankar Ram").

[2] The plaintiff and his counsel filed two appeals each. Civil Appeals No. Q-02(IM)(NCvC)-120-01-2021 and No. Q-02(IM)(NCvC)-121-01-2021 are the respective appeals of the plaintiff and his counsel, Mr Shankar Ram against the order of dismissal of the suit and the finding of "*prima facie*, contempt" whereas Civil Appeals No. Q-02(IM)(NCvC)-247-01-2021 and No. Q-02(IM)(NCvC)-248-01-2021 are the respective appeals of the same parties in respect of the disagreement over the terms of the draft order in question.

Background Facts And Issues

[3] The brief facts pertaining to the impugned order of the High Court are as follows. The plaintiff and defendant are political adversaries who sued each other for defamation in this suit by way of main claim and counterclaim respectively. Filing of cause papers and case preparation proceeded uneventfully until at a case management hearing, the presiding learned Judicial Commissioner realised that the bundle of documents and pleadings were filed late by Mr Shankar Ram. The learned Judicial Commissioner was not satisfied with the explanation of Mr Shankar Ram for the delay. His Lordship dismissed the suit and found that Mr Shankar Ram committed "*prima facie*, contempt in the face of the court". We shall consider the facts surrounding these decisions in more detail later. Interestingly, although counsel for defendant did not apply to the court for any sort of sanction for the late filing of the bundle of documents, he vigorously opposed the instant appeals. Thus, the appeals were fully argued.

[4] Two main issues arise in these appeals, that are;

(i) Whether the learned Judicial Commissioner erred in finding that counsel for the plaintiff committed "*prima facie*, contempt in the face of the court".

(ii) Whether the learned Judicial Commissioner erred in dismissing the plaintiff's claim under O. 34 r. 2(3) of the Rules of Court 2012.

Contempt Finding

[5] On 27 October 2020, the learned Judicial Commissioner gave some case management directions to counsel for the parties. In respect of the bundle of documents, he directed both parties to file the same by 7 December 2020. The matter was called up again before the learned Judicial Commissioner on 11 January 2021 for case management. Mr Shankar Ram informed the court that he filed the bundle of documents on 6 January 2021 and that the defendant's bundle of documents was filed on 8 December 2020. Mr Shankar Ram then informed the court that the statement of agreed facts had been forwarded to the defendant's solicitors. No issue was raised at this point by counsel for the defendant about the filing of the bundle of documents by the plaintiff which was late by one month contrary to the case management direction issued by the learned Judicial Commissioner.

[6] Nonetheless, the learned Judicial Commissioner asked for explanation for the delay from Mr Shankar Ram. A lengthy explanation was given for the delay. The details of the explanation are not strictly relevant for the purpose of this appeal. We are inclined to think that it is within the purview the learned Judicial Commissioner as the judge of first instance to consider whether they are excusable or otherwise. The learned Judicial Commissioner asked Mr Shankar Ram to check whether the notes of proceedings were

correctly typed by the court transcriber. Counsel for the plaintiff also told the court that the bundle of pleadings was also filed late on 6 January 2021 for the same reasons.

[7] At this point, counsel for the defendant put on record his objection to the late filing of the bundle of documents and bundle of pleadings. But he did not ask for any sanctions against the plaintiff or his counsel. He only asked for "strict directions for future conduct of the case so that there is no delay". The learned Judicial Commissioner again asked Mr Shankar Ram to check the notes of proceedings typed by the court transcriber and make the necessary corrections. He then adjourned the proceedings to "reflect on the explanation for the delay". The matter was adjourned to 14 January 2021.

[8] The case was brought forward on 12 January 2021. The learned Judicial Commissioner without indicating to Mr Shankar Ram that his explanation on the previous occasion did not commend itself to the court or that he was minded to cite him for contempt pronounced that he is "taking the following actions":

> 1. The Court on its motion is hereby dismissing the Plaintiff's claim under Order 34 rule 2(3) for the Plaintiff's default in complying with the directions of the Court given on October 27, 2020, with costs of RM30,000.00 to be paid by the Plaintiff to the Defendant subject to allocator. So ordered.
>
> 2. The Court finds counsel for the Plaintiff Mr Shankar to have committed, *prima facie*, contempt in the face of the Court. The Court finds Mr Shankar's explanation for the one month's delay in the filing of the Plaintiff's bundle of documents and even longer delay in the filing of the bundle of pleadings, to be nonsensical and not believable. A litigant or counsel holding back his bundle of documents for one month in defiance of the Court's directions while he has the opportunity to peruse the bundle of documents of his adversary during such period, is guilty of obstruction of justice and compromising the integrity of the trial of the action, among other things. Further to Order 52 rule 2A(1), the Court will fix a date for Mr Shankar to be heard in his own defence.

[9] After enquiring how long counsel for the plaintiff would need to prepare his defence, the learned Judicial Commissioner made a further order as follows:

> 3. The Court will refer Mr Shankar's conduct in this case subsequent to October 27, 2020, to the advocates disciplinary tribunal.

Issues In Relation To The Contempt Finding

[10] We shall address the issues pertaining to the contempt finding under the following sub-headings:

(i) Procedural correctness.

(ii) Whether contempt in the face of the court? A

(iii) Whether appealable?

Procedural Correctness

[11] The learned Judicial Commissioner made a finding of "*prima facie*, contempt" in the face of the court against Mr Shankar Ram. Prior to making such a finding, the learned Judicial Commissioner gave no warning or any indication whatever that he intended to commence contempt proceedings against him. After pronouncing the finding of "*prima facie* contempt", he proposed to fix a date for Mr Shankar Ram to prepare his defence. Mr Shankar Ram has complained about the procedure adopted by the learned Judicial Commissioner. We find substantial merit in it. B C

[12] The power to punish contempt of court by the superior courts is provided in art. 126 of the Federal Constitution and s. 13 of the Courts of Judicature Act 1964. The procedure to institute contempt action in the superior courts is regulated by O. 52 of the Rules of Court 2012. In our opinion, quite apart from the question of the propriety of the contempt action, we find that procedure followed by the learned Judicial Commissioner contravened O. 52 of the Rules of Court 2012. Our reasons are as follows. D

[13] The learned Judicial Commissioner identified the type of contempt that warranted action by him as "contempt in the face of the court". He said so in the notes of proceedings and in the grounds of decision furnished to us. Assuming that the identification of the type of contempt is correct, we shall now consider whether, the learned Judicial Commissioner followed the correct procedure when citing the advocate for contempt. E F

[14] Order 52 provides the procedure for contempt proceedings. Three types of procedure are mentioned, ie, procedure for contempt that is initiated by the court (as in this case) and the procedure for contempt that is either initiated by the Attorney General or a party. It goes without saying that whichever procedure is availed to institute contempt proceeding, the procedural requirement must be strictly adhered to (see *Uthayakumar Ponnusamy v. Abdul Wahab Abdul Kassim (Pengarah Penjara Kajang) & Ors* [2020] 1 CLJ 82). We reproduce *in toto* O. 52 r. 2A which governs contempt in the face of the court: G H

2A. Contempt committed in the face of the Court (O. 52 r. 2A)

(1) If a contempt is committed in the face of the Court, it shall not be necessary to serve a formal notice to show cause, but the Court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence, and the Court shall make a proper record of the proceedings. I

A (2) Where a Judge is satisfied that a contempt has been committed in the face of the Court, the Judge may order the contemnor to appear before him on the same day at the time fixed by the Court for the purpose of purging his contempt.

(3) Where such person has purged his contempt by tendering his
B unreserved apology to the Court and the Judge considers the contempt to be not of a serious nature, the Judge may excuse such person and no further action shall be taken against him.

(4) Where such person declines or refuses to purge his contempt, then the Judge shall sentence him.

C **[15]** The procedure in O. 52 r. 2A is a summary procedure unlike the procedure stipulated in O. 52 r. 3. There is no requirement for formal notice. There is no requirement for the Attorney General or an aggrieved party to seek leave *via* a written application under O. 52 r. 3 before the alleged contemnor can be summoned to the court. The summary procedure applies
D only to contempt in the face of the court. At first glance, it appears that under O. 52 r. 2A, the hearing is divided into two stages. But a holistic reading of r. 2A(1) and (2), would reveal that insofar as the finding of guilt for contempt in the face of the court is concerned, there is only one stage. Order 52 r. 2A(1) says that if contempt is committed, the judge shall make a proper
E record but shall ensure that opportunity is given for the alleged contemnor to be heard although formal notice is not necessary. This rule refers to the person on whom action is taken as "the person alleged to be in contempt" or in other words the alleged contemnor. This is the first stage of the hearing.

[16] Order 52 r. 2A(2) says that once the judge is satisfied that contempt
F has been committed, he may order the contemnor to appear before him on the same day for the purpose of purging his contempt. The word "contemnor" is used in this rule which means that judge had already determined guilt of "the person alleged to be in contempt". This is certainly the mitigation stage and not the stage where the alleged contemnor can defend
G himself as to his guilt in respect of contempt. Order 52 r. 2A(3) makes this clear. It says that such a person can purge his contempt by tendering unreserved apology. Order 52 r. 2A(4) makes it even clearer. If the contemnor refuses to purge his contempt, he can be "sentenced".

[17] The procedure for contempt other than contempt in the face of the
H court is different. Order 52 r. 3 requires a written *ex parte* leave application supported by a statement to be made before the alleged contemnor is summoned to court. If leave is granted, the application for order of committal must be served on the alleged contemnor eight days before the date of hearing. The grounds of committal must be stated in the statutory
I statement. Thus, the hearing is divided into two stages prior to the finding of contempt. The applicant must make an *ex parte* application before the court to summon the alleged contemnor. He must demonstrate to the court

that there is a *prima facie* case of contempt for leave to be issued (see *Mukhriz Mahathir v. Datuk Seri Mohd Najib Tun Hj Abdul Razak & Anor* [2018] 6 CLJ 573). Once the contemnor is in court, he will be heard before an order of committal is made (see O. 52 r. 6(4)). In respect of punishment for contempt, O. 52 r. 9 gives the court the power to mitigate punishment once the contemnor is found guilty of contempt. This is the third phase of the hearing.

[18] To recapitulate the relevant facts, the learned Judicial Commissioner asked Mr Shankar Ram at the case management hearing to explain the delay in filing the bundle of documents. After recording the explanation and asking him to check the accuracy of the notes of proceedings, he adjourned the proceedings. When the hearing resumed the next day, he pronounced that Mr Shankar Ram "committed, *prima facie*, contempt in the face of the court". Since, the learned Judicial Commissioner proceeded on the assumption that the contempt in question was contempt in the face of the court, he is obliged to give an opportunity to Mr Shankar Ram to understand the nature of the offence and the opportunity to be heard in his own defence as provided in O. 52 r. 2A(1). By no stretch of imagination, it can be said that Mr Shankar Ram would have had notice of the impending contempt action merely because the learned Judicial Commissioner asked him to explain the delay for not complying with a case management direction and by asking him to check the accuracy of the notes that he recorded. There was absolutely no warning or any sort of indication that he intended to cite him for contempt.

[19] We have also considered the order of the learned Judicial Commissioner that Mr Shankar Ram appear before him on another day to defend himself. Counsel for the defendant submitted that this means that contempt proceedings had not terminated and therefore the order of the learned Judicial Commissioner is not appealable as it did not finally dispose of his right. We find this submission to be flawed for this reason. We took pains to point out earlier that in respect of a contempt finding under O. 52 r. 2A, there is only one stage of hearing before the guilt of the alleged contemnor is determined unlike contempt proceedings under O. 52 r. 3. There is no provision for service of contempt application on the alleged contemnor before he is called to answer the charges in the statutory statement. Therefore, the finding of "*prima facie*, contempt in the face of the court" as recorded by the learned Judicial Commissioner has no basis in the scheme of O. 52. Contempt in the face of the court is governed by a summary procedure. No formal notice of charge is required but the alleged contemnor must understand the offence and be given the opportunity to defend himself before a finding is made.

[20] In the instant case, the learned Judicial Commissioner made a finding that Mr Shankar Ram committed "*prima facie*, contempt in the face of the court". Since, under O. 52 r. 2A(1), a judge is not required to make any

preliminary finding whatsoever (unlike in cases that come under O. 52 r. 3) before the alleged contemnor is afforded an opportunity to defend himself, it must be taken that to all intent and purposes, the learned Judicial Commissioner made a finding of contempt against Mr Shankar Ram without hearing his defence. In fact, his reasons for the finding of "*prima facie*, contempt in the face of the court" point to the fact that he decided the contempt action without hearing his defence. The learned Judicial Commissioner said that the explanation of Mr Shankar Ram for the delay was "nonsensical and not believable" and that he was "guilty of obstruction of justice and compromising the integrity of the trial of the action". In the grounds of decision, the learned Judicial Commissioner said as follows:

> [52] The conduct of learned counsel in breaching and manipulating the Court's directions, the complete absence of any sign of acknowledgement of wrongdoings, the sheer impudence of learned counsel in coming up with an absurd and obviously untrue explanation for the breach and manipulation, all add up to one thing: learned counsel had nothing but contempt for the Court and the Court's processes.

[21] Thus, by making all the above findings without warning Mr Shankar Ram that he was citing him for contempt, the learned Judicial Commissioner missed an important procedural step in O. 52 r. 2A(1) that embodies a natural justice principle, ie, no man shall be condemned unheard. We are mindful as pointed out by counsel for the defendant that the learned Judicial Commissioner fixed a date for Mr Shankar Ram to defend himself under O. 52 r. 2A(1). However, as we said earlier and we repeat now, in the summary procedure stipulated in O. 52 r. 2A(1), a finding of contempt, *prima facie* or otherwise, must only be made after opportunity to defend is given. It is quite disingenuous of counsel for the defendant to argue that Mr Shankar Ram will be able to defend himself at the proposed hearing given the forceful and emphatic findings of the learned Judicial Commissioner that we quoted earlier from the notes of proceedings and the grounds of decision. Such findings were not required in the first place under O. 52 r. 2A(1) before a hearing is given to afford Mr Shankar Ram an opportunity to defend himself.

[22] For all the above reasons, we find that the procedure adopted by the learned Judicial Commissioner was flawed and prejudiced the right of Mr Shankar Ram to defend himself under O. 52 r. 2A. On this ground alone, we wholly set aside the finding of contempt against Mr Shankar Ram.

Whether Contempt In The Face Of The Court?

[23] We have also considered whether the conduct complained of constitutes contempt in the face of the court. Contempt in the face of the court is invoked for cases whenever there is gross interference with the

course of justice and whenever it is urgent and imperative for the court to act at once. In all other cases, it would be prudent for the court to consider whether the transgression complained of is more suited for the initiation of contempt proceedings by the Attorney General under O. 52 r. 3 of the Rules of Court 2012. In this case, we are mindful that the learned Judicial Commissioner had stated that Mr Shankar Ram had "compromised the integrity of the trial and obstructed the administration of justice". The learned Judicial Commissioner may have good reasons to disbelieve the explanation for the delay. It was within his purview to come to that conclusion. However, we find that there was no material before His Lordship for the finding that Mr Shankar Ram obstructed the administration of justice. The only undisputed evidence was that Mr Shankar Ram had neglected to file the bundle of documents and bundle of pleadings within the stipulated time frame. If there was material to suggest that Mr Shankar Ram "compromised the integrity of the trial and obstructed the administration of justice" at the case management stage, it is for the opposing party to take a position on this matter and file a motion under O. 52 r. 3 of the Rules of Court 2012. Nothing of this sort happened as counsel for the defendant did not complain beyond pointing out the delay. In the premises, with respect, in our view, the learned Judicial Commissioner erred in making a finding of contempt in the face of the court, "*prima facie*" or otherwise against Mr Shankar Ram.

Whether The Said Orders Are Appealable?

[24] Learned counsel for defendant argued that the said orders of the learned Judicial Commissioner are not appealable and raised it as a preliminary issue. We shall address it now. As we explained earlier, the learned Judicial Commissioner had made emphatic findings of guilt against Mr Shankar Ram without hearing him in so far as contempt action was concerned. In addition, the learned Judicial Commissioner made an order that Mr Shankar Ram be referred to the Advocates Disciplinary Tribunal. We again note this order was made without hearing the defence of Mr Shankar Ram. In fact, a copy of the court's letter to the Advocates Disciplinary Tribunal had been brought to our attention. In the premises, we are of the view that these are final orders that prejudiced the rights of Mr Shankar Ram and are therefore appealable. The preliminary objection was therefore without any merit.

Dismissal Of The Plaintiff's Claim

[25] As we said earlier, the learned Judicial Commissioner summarily dismissed the plaintiff's claim under O. 34 r. 2(3) of the Rules of Court 2012 for non-compliance of the case management directions. We shall now repeat and state in more detail the background facts relating to this decision.

[26] The case management directions were given by the court on 27 October 2020. Among other directions, parties were directed to file the bundle of pleadings by 30 November 2020 and the bundle of documents by 7 December 2020. The plaintiff delayed the filing of the bundle of documents by one month and the bundle of pleadings by slightly more than a month.

[27] The facts summarised by the learned Judicial Commissioner reveal that Mr Shankar Ram did not write to the court to ask for any extension of time and did not seek indulgence from counsel for the defendant during the period of delay.

[28] Before we proceed further, we are conscious of the argument of Mr Shankar Ram that the defendant was late by one day in filing the bundle of documents. Having in mind the words of the old adage that two wrongs do not make a right, we find this argument to be irrelevant. What is relevant in these appeals is whether the summary disposal of the plaintiff's suit is justifiable in all the circumstances of this case.

[29] We are mindful that the power to dismiss an action summarily for non-compliance of pre-trial case management directions is provided under O. 34 r. 2(3) of the Rules of Court 2012 which reads as follows:

> (3) The Court, having given directions under rule 2(2) or rule 3 may either on its own motion or upon the application of any party, if any party defaults in complying with any such directions, dismiss such action or proceedings or strike out the defence or counterclaim or enter judgment or make such order as it thinks fit.

[30] We have examined the grounds of decision of the learned Judicial Commissioner for dismissing the plaintiff's claim summarily. His Lordship has given reasons why he did not accept the explanation of Mr Shankar Ram for the delay in filing the bundle of documents. As we said earlier, we are not minded to interfere with His Lordship's decision to reject the said explanation. However, we are of the considered view that the summary dismissal of the plaintiff's claim in all the circumstances of the case cannot be supported. Our reasons are as follows.

[31] We note that the defendant merely objected to the delay but did not ask for the plaintiff's claim to be dismissed or struck out. The learned Judicial Commissioner, however, summarily dismissed the plaintiff's claim on his own motion, primarily on the ground that "the withholding of the plaintiff's bundle for one month while having the opportunity of perusing the defendant's bundle of documents for the same period has compromised the integrity of the trial and obstructed the administration of justice". The learned Judicial Commissioner added that "the plaintiff had gained an unfair and material advantage over the defendant". The learned Judicial Commissioner's other grounds on this point are found in paras. 39 to 46 of his grounds of decision.

[32] At the stage when the learned Judicial Commissioner dismissed the plaintiff's claim, the trial was approximately two months away, the trial dates being 1 March 2021 to 5 March 2021 and 8 March 2021 to 12 March 2021. Counsel for the defendant, despite bringing to the court's attention about the one-month delay in the filing of the plaintiff's bundle of documents and pointing out that their preparation has been hampered, did not ask for an adjournment of the trial and did not give any indication that he will be unable to prepare the witness statements and the issues for trial. On the contrary, counsel for defendant assured the court that he will endeavour to prepare the witness statements by 1 February 2021 as per the direction of court at pre-trial case management hearing. Counsel for the defendant also said that he shall state his stand in respect of the preparation of the common bundle of documents by the following week. As for the agreed facts, counsel for the defendant said that he was going to return the same to the plaintiff by the next day and said that he will file the plaintiff's issues for trial as parties were unable to agree on common issues. Furthermore, all that the counsel for the defendant sought from the court was that strict instructions are given "for future conduct so that there would not be any delay by any parties". We repeat that counsel for the defendant did not apply for a dismissal of the plaintiff's claim. In the premises, there was no reason to assume that the trial would be disrupted or compromised in any way because of the delay of the filing of the plaintiff's bundle of documents by one month.

[33] We are also of the view that there was no material for the learned Judicial Commissioner to conclude that the plaintiff had gained "unfair material advantage over the defendant". Admittedly, plaintiff delayed in filing the bundle of documents by one month. However, the suit concerns a defamation action. The relevant documents are already in the public domain. In any event, the plaintiff's bundle of documents comprised largely of the defendant's documents. In the premises, the finding that "the plaintiff got to see the defendant's card while holding his own cards to his chest, figuratively speaking", is not tenable.

[34] We also note that there was no prior warning that the court would dismiss the claim of the plaintiff if the bundle of documents were not filed within the stipulated time. There was no unless or peremptory order issued by the court prior to the date of the dismissal of the action. We are mindful that the requirement for a prior peremptory order or unless order is not stated in O. 34 r. 2(3). Be that as it may, we are of the view that unless the nature of the non-compliance is sufficiently serious to defeat the purpose of the case management directions, the drastic action of dismissing the action without warning should not be resorted to. The purpose of pre-trial case management directions is to "secure the just, expeditious and economic disposal of the action or proceedings" (see O. 34 r. 2(2) of the Rules of Court 2012). In the instant case, by all accounts including that of counsel for the defendant as we

noted earlier, the trial schedule was not disrupted despite the delay in the filing of the bundle of documents by the plaintiff. Therefore, the dismissal of the suit merely because the explanation for the delay was unbelievable cannot be reconciled with the main purpose of the case management regime provided in O. 34 of the Rules of Court 2012 that we adverted to earlier.

[35] For avoidance of doubt, we hasten to add that we are in no way condoning the delay in complying with the court's case management directions on the part of Mr Shankar Ram. However, given the fact that the non-compliance in question cannot be construed as amounting to total disregard of directions that affected the conduct of the trial or derailed the trial that was still on track at that time, the avenue of penalising the plaintiff under O. 59 r. 8(b) of the Rules of Court 2012 at the end of the trial with a costs order to show the court's disapproval would have been more appropriate. The said rule enacts that the court in exercising its discretion as to costs shall in appropriate circumstances consider, among others, "the conduct of all the parties, including conduct before and during the proceedings". It would have been otherwise if the bundle of documents and bundle of pleadings were not filed at all or other directions were ignored despite the looming trial date.

[36] For all the above reasons, we are of the considered view that the learned Judicial Commissioner had wrongly exercised his discretionary power to dismiss the claim of the plaintiff summarily.

[37] Counsel for the defendant also raised an argument belatedly during oral submissions that the plaintiff should have applied to set aside the order of dismissal of his claim under O. 34 r. 2(4) of the Rules of Court 2012 before appealing to the Court of Appeal. We note that the provision uses the permissive "may" when giving the option to the aggrieved party to go before the same court to set aside the order of dismissal of the action. It does not prevent the filing of an appeal. In this case, the learned Judicial Commissioner made various findings of fact in respect of the explanation for the delay that was proffered by counsel for the plaintiff. His Lordship also found counsel for the plaintiff guilty of "*prima facie*, contempt of court". In the premises, we do not think that the plaintiff should be compelled to invoke O. 34 r. 2(4) of the Rules of Court 2012.

Terms Of Draft Order

[38] Civil Appeals No. Q-02(IM)(NCvC)-247-01-2021 and No. Q-02(IM)(NCvC)-248-01-2021 are in respect of the terms of the draft order that was not sealed by the court. In these appeals, the plaintiff and Mr Shankar Ram had applied to include the following paragraphs in the draft order, ie, para. (3) that mentions "finding of *prima facie*, contempt", para. (4) that deals with the reasons for the rejection of the explanation of the delay by the court and para. (5) that is in respect of the referral of

Mr Shankar Ram to the Advocates Disciplinary Tribunal. These three paragraphs were deleted by the court and hence the appeals. In view of the reasons we gave earlier, we find that there is merit in these appeals for the inclusion of paras. (3) and (5) only as the same are decisions that finally disposed of the right of Mr Shankar Ram. In the premises, these appeals are allowed to that extent.

Conclusion

[39] For all the foregoing reasons, we find that appellate intervention is warranted in this case. We therefore allow all the four appeals and set aside the orders of the High Court dated 12 January 2021 and 3 February 2021. The plaintiff's claim is hereby reinstated. We also order that the case be heard before another judge. No order as to costs.